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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON, E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES, *Petitioners*,

v.

WEYERHAEUSER SALES COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON AND BRIEF IN SUPPORT THEREOF

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WEYERHAEUSER SALES COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of the Tax Commission of the State of Washington and its members respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Tax Commission of the State of Washington seeks review of a decision of the Supreme Court of Washington holding that its business and occupation tax as

imposed upon respondent discriminates against interstate commerce and is, therefore, invalid, as violative of the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3).

The Washington business and occupation tax, considered by this Court in *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, is imposed pursuant to Chapter 180, Washington Laws of 1935, as amended, known as the "Revenue Act of 1935." It is a gross receipts tax levied and collected from every person engaged in business in the State for the privilege of so engaging in business. This action involves the validity of the inclusion in the measure of the tax upon respondent, a firm engaged in various local business activities in Washington, its receipts from that portion of its wholesale sales in this state in which delivery of the merchandise was made from a point outside of Washington in interstate commerce directly to the buyer in the State of Washington. Thus, the question before this Court in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, affirming, *per curiam*, 220 Ind. 340, and *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, involving the Indiana gross receipts tax was presented for determination under the Washington gross receipts tax. There is involved no issue relative to including in the measure of the tax sales for delivery from Washington to buyers outside of the State as was involved in two other Indiana cases, *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249. Nor is there any issue relative to foreign commerce.

The Revenue Act (see Appendix A) imposes a tax upon the gross receipts of all those engaged in business in Washington, but the rate and measure for calculation of the amount of the tax is determined by reference to the particular classification into which the business activity falls. § 4, Revenue Act. The terms are so broad that one who is a manufacturer will fall into both the wholesalers' (or retailers') and the manufacturers' classification in any case where he disposes of his produce by sale in Washington. § 5(e)(j), Revenue Act. This inequity is prevented by a provision that one taxable for the manufacture in Washington of an article shall not again pay the same tax for the same activity under the other category. § 6, Revenue Act.

The facts, which have been stipulated (R. 26-35), may be summarized as follows:

Respondent Weyerhaeuser Sales Company, a Washington corporation (R. 26), engages in the business of selling lumber and lumber products at wholesale to purchasers in the State of Washington and to purchasers in other States and foreign countries (R. 29). Respondent maintains sales offices in Washington, employs salesmen who reside in Washington, and regularly solicits orders in Washington for sales of products to be delivered to buyers in Washington both from within and without the State (R.30). Respondent performs no manufacturing activities either within or without the State, therefore all products sold by it have been purchased from others for such resale (R. 30-31). Of the products sold by respondent to purchasers in Washington, large quantities are located within the State and are delivered to the purchaser without recourse to interstate transportation (R.

29). Respondent makes sales of pine lumber to purchasers in Washington, all of which lumber is located in Oregon and Idaho (R. 29-30). These "pine lumber sales" provide the basis of the dispute in the instant action. Details thereof may best be understood by setting forth paragraph VI of the stipulation of facts (R. 30):

> Each of said pine lumber sales was made in the following manner: a contract was made between plaintiff, as a wholesaler, and a purchaser having his place of business in the State of Washington providing for the sales of specified sizes and grades of lumber by plaintiff out of stocks of lumber manufactured or to be manufactured by a designated manufacturing plant or plants in the State of Oregon or the State of Idaho and for the transportation thereof f.o.b. common carrier at the point of shipment to the purchaser in the State of Washington. Title to the lumber passed to the purchaser at the time of delivery to the carrier, and risk of loss thereafter rested upon the purchaser. In accordance with the contract, the lumber was transported by common carrier at the purchaser's expense to his place of business in the State of Washington and possession thereof was taken by the purchaser from the common carrier at that place. Part of the said pine lumber sales, the gross proceeds of which amounted to $1,919,874.96, was made pursuant to purchase orders received and accepted by plaintiff in the State of Washington, and the remainder of said sales, the gross proceeds of which amounted to $1,355,108.10, was made pursuant to purchase orders which were not solicited by plaintiff in the State of Washington but were transmitted by purchasers from points in the State of Washington and in other States to plaintiff who received and accepted them in other states for transportation to the State of Washington as aforesaid. The plaintiff's gross receipts from all of said pine lumber sales amounted, therefore, to $3,274,983.06. Payment for all of said lumber was received at, and collected by plaintiff's office in Tacoma, Washington.

Respondent has paid business and occupation tax measured by its wholesale sales of products located in

Washington (R. 29), but has refused to pay tax measured by the pine lumber sales delivered to Washington purchasers (R. 16, 19, 31, 32).

Respondent commenced this action to enjoin petitioners from collecting any tax measured by pine lumber sales, on the ground that a tax on such interstate commerce would be repugnant to the Commerce Clause of the Federal Constitution and thereby deductible under § 12(f) of the Revenue Act (R. 5-6). A judgment of the Supreme Court of Washington has resulted in favor of respondent (R. 40) based upon its decision that the tax discriminated against interstate commerce (R. 23).

A companion case involving issues substantially identical to those herein presented was decided by the Washington Supreme Court simultaneously with the present case. A petition for certiorari, *State of Washington v. Columbia Steel Company,* for review of that case is also being presented to the Court at this time. The opinions in that case, upon which judgment in the present action was based, are reproduced herein as Appendices B and C.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction under section 1257(3) of Title 28, United States Code, Judiciary and Judicial Procedure. The Supreme Court of Washington has held that the business and occupation tax as imposed upon respondent is invalid as repugnant to the Constitution of the United States (R. 23). The Washington statute involved is Chapter 180, Washington Laws of 1935, as amended, designated herein as the "Revenue Act." Pertinent portions of Title II of the

Revenue Act, imposing the business and occupation tax, are set out in Appendix A.

The *en banc* opinion of the Supreme Court of Washington was filed on September 3, 1949 (R. 37), and as provided in section 5, Chapter 24, Washington Laws of 1909, the decision did not become final for thirty days. Thereafter, on October 4, 1949, its judgment was entered (R. 40). This petition is filed within ninety days after the entry of that judgment. Section 2101(c), Judicial Code. The judgment is final, being rendered by the highest court of the State in which a decision could be had, and is such a judgment as is here subject to review. *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22.

The judgment is in the hands of the Supreme Court of Washington, execution thereof having been stayed (R. 39). Accordingly, the writ should be directed to that Court.

The federal constitutional issues are properly preserved. The facts have never been in dispute (although two appeals were taken to the Supreme Court of Washington due to procedural complications alone), and the sole issue involved has at all times been whether the tax as applied violated the Commerce Clause of the United States Constitution. This action has at every stage been decided upon this federal question. The issue involving the federal question was framed in the following manner:

Pursuant to its duly promulgated rule (R. 27-29), petitioners served a notice of deficiency in payment of tax upon respondent (R. 31). Respondent filed a petition (R. 16) with the Tax Commission, received a hearing which resulted in a denial of the petition (R. 19), and later commenced this action in the Superior Court of

Washington to enjoin collection (R. 1, 6) alleging that the tax was prohibited by the Commerce Clause (R. 6). The State's demurrer to the complaint (R. 20) was sustained (R. 21), and judgment of dismissal taken (R. 21) as required in Washington practice. Appeal was taken to the Supreme Court of Washington. In the opinion rendered on this first appeal (R. 22), the opinion in the companion case, *Columbia Steel Company v. State*, 30 Wn. (2d) 658, was deemed controlling (R. 23). In that opinion the federal question was the sole issue before the Court and was the basis for its decision, as follows:

> "There have been hundreds of cases decided which deal with the imposition of taxes of the nature here involved. However, our view of the applicable rules of law makes it unnecessary to review many of the cases on the subject of taxing interstate commerce in so far as this case is concerned. The one question presented here is: May this state collect from those engaged in interstate commerce, taxes based on our business and occupation tax, Rem. Supp. 1943, §§ 8370-4, *et seq.* [§ 4, *et seq.*, Revenue Act]" (Appendix B, page 41.)
>
> "* * * In our opinion, the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal constitution, and is invalid." (Appendix B, page 45.)

The petition for rehearing was denied. Despite the fact that a stipulation had been entered declaring that the facts were accurate and that the State had no defense other than its argument upon the legal issue, and requesting that the opinion be modified to permit entry of a final

judgment without further proceedings, a judgment of the Supreme Court was entered remanding the action to the trial Court for further proceedings with instructions to overrule the demurrer (R. 24). (The papers referred to, found in the certified transcript of the record, pp. 35-39, have not been incorporated into the printed record.)

Petitioner thereupon filed in the trial court its answer (R. 26), and the facts were stipulated (R. 26-35), but substantially the same questions were presented as on the first appeal. The lower court accordingly entered judgment for respondent (R. 36), and a second appeal was taken to the Supreme Court of Washington. The *per curiam* opinion of the Supreme Court of Washington (R. 37) recited the proceedings had in the cause and declared as follows (R. 38):

> "Both appellants and respondent agree that the stipulated statement of facts before us submits substantially, if not exactly, the same questions presented upon the first appeal in this action, and essentially the same questions which we have decided in the case of *Columbia Steel Co. v. State, supra* * * *.
>
> "In the case at bar, as no tax was paid by respondent, no question concerning interest is involved. With that exception, the issues in this case are the same as those presented in *Columbia Steel Co. v. State, supra,* filed this day. The legal principle of 'the law of the case' applies in the case at bar, as well as in the case last cited.
>
> "In accordance with the conclusions we have reached in the *Columbia Steel Co.* case, the judgment appealed from is affirmed."

Judgment has been entered for respondent (R. 40), and this petition prays for review thereof.

Following the decision on the first appeal and the entry of the judgment of the Supreme Court of Washing-

ton remanding the cause to the trial court for further proceedings, petitioner was faced with a situation similar to that involved in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251, in that it had to proceed further in order to obtain a final judgment even though the point which had been decided and which would be subject to review by the Supreme Court of the United States was disposed of in the first appeal.

QUESTION PRESENTED

The question presented is whether the Washington business and occupation tax, as imposed upon one admittedly engaged in local business in the State and measured in part by sales receipts attributable to goods delivered in interstate commerce to buyers in Washington, discriminates against or imposes an unconstitutional burden upon interstate commerce.

REASONS FOR ALLOWANCE OF THE WRIT

The reasons relied on by petitioner for allowance of the writ are as follows:

1. In holding that the Washington business and occupation tax by its terms *discriminates* against interstate commerce, the Supreme Court of Washington has decided a federal question of substance not heretofore determined by this Court, and in a way not in accord with principles established with analogous cases cited in the accompanying brief. If the decision of the lower court is correct, then the gross receipts taxes of most states likewise discriminate against interstate commerce.

2. The decision below is in conflict with *Allied Mills v. Department of Treasury*, 318 U. S. 740, affirming, *per curiam*, 220 Ind. 340, and *International Harvester Co. v.*

Department of Treasury, 322 U. S. 340, upholding gross receipts taxes involving interstate sales, as well as being contrary to the principles established in decisions of this Court in cases involving state sales and use taxes.

3. The decisions of this Court in *Allied Mills v. Department of Treasury, supra*, and *International Harvester Co. v. Department of Treasury, supra*, have been cast in doubt by the opinion of the Court in *Freeman v. Hewit*, 329 U. S. 249. In the *Freeman* case language was used which has been construed by state tax administrators, legal writers, businessmen and courts to reflect a dissatisfaction with the holdings in the first two cited cases. It is essential that this doubt and uncertainty be resolved, and this may be accomplished by a review of this cause.

4. This case and its companion case, *State of Washington v. Columbia Steel Company*, are test cases on the outcome of which depend decisions upon many other petitions now before the Tax Commission involving substantially the same question. The question is one of general public importance, and is of special importance to states imposing gross receipts taxes and depending thereupon for large portions of their revenue. Large numbers of purchasers and sellers and sums of money running into many millions of dollars annually are involved in the State of Washington alone.

5. The decision of the Supreme Court of Washington unduly limits the taxing powers of the State, and will provide a motive for business concerns to fill orders from out-of-state stocks while maintaining selling offices and conducting other business within the State, thereby totally evading tax which local business must pay in order to provide needed revenue for the State. The result

would be a loss of wealth and employment to the State, and will bring about a shrinkage of revenue from all forms of taxes. By its decision, the Commerce Clause has been made a device to subject local vendors to a competitive disadvantage in selling upon the same local market.

WHEREFORE, your petitioner prays that a writ of certiorari issue directed to the Supreme Court of Washington to the end that this cause may be reviewed and determined by this Court, and that the judgment herein of said Supreme Court below be reversed by this Court, and for such further relief as the Court may deem proper.

DATED this 23rd day of December, 1949.

TAX COMMISSION OF THE STATE OF WASHINGTON, E. C. HUNTLEY, E. W. ANDERSON, and T. S. HEDGES.

By: SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
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WEYERHAEUSER SALES COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURT BELOW

The opinion in the Supreme Court of Washington on the first appeal thereto of this cause (R. 22) is reported in 30 Washington Reports, 2d Series, page 947. The opinion of the Supreme Court of Washington on the second appeal thereto of this cause (R. 37), is not yet printed in the official reports. Pertinent portions of the opinions in the companion *Columbia Steel Company* case are reproduced herein in the appendices.

JURISDICTION

The date of the judgment to be reviewed is October 4, 1949. The statutory provision which is believed to sustain the jurisdiction of this Court is § 1257(3) of Title 28, United States Code, Judiciary and Judicial Procedure. This petition is filed within ninety days of the entry of such final judgment. § 2101(c), Judicial Code. The sole issue below was whether the tax, as applied, was repugnant to the Federal Constitution. A complete statement of the proceedings below leading up to the final judgment of the Supreme Court of Washington is contained in the preceding petition.

STATEMENT OF THE CASE

Respondent is a Washington corporation doing business in that State in the millions of dollars annually (R. 29, 30). It concedes and pays this business and occupation tax upon such local business as is measured by some of its sales in Washington (R. 29), but has refused to pay the tax as measured by the receipts from such local sales to Washington buyers where the goods enter from Oregon and Idaho. All the facts have been stipulated (R. 26-35). A more detailed summary of the facts is set out in the preceding petition.

SPECIFICATION OF ERRORS

The Supreme Court of Washington erred in holding that the Washington business and occupation tax is repugnant to the Commerce Clause of the United States Constitution as applied to respondent. The Court erred in basing this view upon the ground that the tax discriminated against interstate commerce; and it further erred in declining to consider the argument that the facts of the case fall within and are controlled by the decisions of

this Court in *Allied Mills v. Department of Treasury*, 318 U. S. 740, affirming *per curiam*, 220 Ind. 340, and *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, and by the principles established by decisions of this Court in analogous cases involving State sales and use taxes.

ARGUMENT

I.

In holding that the Washington business and occupation tax discriminates against interstate commerce, the Supreme Court below has decided a federal question of substance not heretofore directly passed upon by this Court, and in a way not in accord with principles established in analogous cases. If the decision is correct, gross receipts taxes of most states likewise discriminate against interstate commerce.

A. The Supreme Court of Washington Held That the Tax Discriminated Against Interstate Commerce.

In an opinion devoid of analysis or reasoning (*Columbia Steel Co. v. State of Washington*, 30 Wn. (2d) 658 Appendix B), which opinion was adopted as the basis for the decision in this companion case (R. 22-23, 37-38), the Supreme Court of Washington ruled that the business and occupation tax discriminated against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce. The Court held that this was due to the provisions of § 6 of the Revenue Act, which provides that one who has been taxed under the manufacturing classification of the business and occupation tax for the performance of local manufacturing activities shall not pay the same tax under the wholesaling classification of that tax statute for the local sale of the article produced. The holding below is embodied in one sentence:

> "In our opinion the statute marks a discrimination against interstate commerce in levying a tax

> upon wholesale activity of those engaged in interstate commerce, which tax is, because of the exemption contained in section 8370-6 [§ 6, Revenue Act], not levied upon those who perform the same taxable act, but who manufacture in the state of Washington." *Columbia Steel Co. v. State,* 30 Wn. (2d) 658, 664; Appendix B, page 45.

No quarrel can be had with the recitations of law in the opinion, but the holding does not follow under the facts of this case. That this is a complete misinterpretation of the overall aim and impact of the Revenue Act, and particularly the purpose of § 6, will be demonstrated below. However, this misdescription of the State statute is not binding upon this Court, and cannot serve to render unconstitutional a tax which in actual effect violates no constitutional provision. Whether a taxpayer is deprived of a federal right will be resolved by this Court after determining the purpose of a statute by its reasonable and natural effect. *Wagner v. City of Covington,* 251 U. S. 95, 102; *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 443; *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 84.

Although respondent was not the manufacturer of any of the goods involved (R. 30-31) (in the *Columbia Steel* case the taxpayer manufactured only 20% of the goods involved), the ruling set forth in the opinion of the Court below is not limited to the situation where the wholesaler is the out-of-state manufacturer of the goods sold (Appendix C, p. 40). That this was in fact the precise holding was emphasized on the second appeal (Appendix C, pp. 51, 52).

B. This Question Has Never Been Passed Upon by This Court.

This particular question has never been directly passed upon by this Court, but reference to other decisions of this Court (cited below) will demonstrate that the holding in the instant case is not in accord with principles set forth therein.

Although the language of the statutes of other states imposing gross receipts taxes may be somewhat different, many, if not all, will be found to have substantially similar effect as the Washington tax. That is, all tax gross receipts only once. It follows that if the holding of the Supreme Court of Washington is correct, then the gross receipts taxes of most other states likewise discriminate against interstate commerce.

This is a matter which must be decided by this Court in its function as the arbiter of competing constitutional demands,

> "that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed." *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 48.

See also, *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434; *McLeod v. Dilworth*, 322 U. S. 327.

C. Analysis of the Business and Occupation Tax.

The Revenue Act imposes a "business and occupation tax" upon all engaged in business in Washington measured by the gross income or gross receipts from business activities in the State. The tax is imposed by § 4, which section also divides all business activities into separate classifications, each of which is assigned a measure and rate for the determination of the amount of

tax for each type of business conducted. These measures are so defined in §§ 5(f) (g) and 7 as to be adaptable to the particular business classifications to which they are assigned. Definitions given are so broad that a particular business activity might fall into two classifications of the same tax. A person who manufactures products in Washington and sells them at wholesale in the State falls under both the manufacturing and wholesaling classifications, inasmuch as a "wholesale sale" is defined as any sale which is not a "retail sale." See § 5(e), Revenue Act. Section 6 serves the function of preventing the same tax from being paid twice, under two separate classifications, upon the same receipt.

Contrary to what the Supreme Court below said (R. 14), the Washington manufacturer who sells his product in the State *does* pay the same tax as one who performs wholesale activities in interstate commerce; § 6 does not exempt such business. it merely designates the classification under which it falls. The tax is paid at the same rate and upon the same measure, but is calculated under a different classification. (Section 4(b) and 4(e) provides for a *rate* of ¼ of 1%; as to the *measure*, § 4(e) provides that for wholesalers it shall be the gross proceeds of sales, and § 7 provides that gross proceeds of sales shall be the measure of the tax for manufacturers who produce and sell their product in this State.) The result is a gross income or gross receipts tax similar to that imposed by many states. All gross income, each and every receipt, from business conducted in Washington is taxed once, and once only.

Why tax a manufacturer under a separate manufacturing classification rather than include him in the whole-

saling classification? Resort to § 7, wherein the measure "value of the products manufactured" is defined, demonstrates that one who is engaged in business as a manufacturer may sell the goods for delivery out of the State, or he may consume them in his business, or he may sell the product at less than its true value. Merely taxing the sale of the product as any other sale at wholesale or retail would not truly reflect the value of the business activities conducted. Under *American Mfg. Co. v. St. Louis*, 250 U. S. 459, a tax on the business activity of manufacturing may be imposed though the product is disposed of by a sale outside of the State, whereas *Adams Mfg. Co. v. Storen*, 304 U. S. 307, forbids the tax on such a sale. The method used is simply one utilized by the legislature to achieve this desirable, and proper, end, which result is the same as is achieved by other gross receipts taxes but perhaps by different forms of legislation. The State of Indiana, in section 3(a) of its Gross Income Tax Act of 1933, which statute has many times been before this Court, has chosen to group with wholesale sales the disposition by a manufacturer of articles produced by him. This is purely a matter of choice by the legislature. The two methods result in the same measure. If Washington discriminates, other states will also be found to discriminate. Actually, the Washington form of statute results in *increased* taxation upon *local* manufacturers.

In passing on the constitutionality of a tax, this Court does not look at the face of the statute, but is concerned only with the practical operation of the tax. *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359.

> "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate com-

merce in applications to concrete facts are our concern." *Nippert v. City of Richmond*, 327 U. S. 416, 431.

How, then, can the Washington business and occupation tax discriminate against interstate commerce?

D. The Tax Does Not Discriminate Against Interstate Commerce.

In *Nelson v. Sears, Roebuck & Co., supra*, pp. 364-365, this Court said:

> "A tax or other burden obviously does not discriminate against interstate commerce where 'equality is its theme.' *Henneford v. Silas Mason Co., supra*, pp. 583, 586; *McGoldrick v. Berwind-White Coal Mining Co., supra*, pp. 48-49."

Equality is the theme of the Washington business and occupation tax. It does not aim at or discriminate against interstate commerce. Section 6—which is the nub of the controversy here—is aimed at giving equal treatment to all. The classifications of § 4 of this business and occupation tax have been upheld as nondiscriminatory and within the legislature's powers by the same court which rendered the judgment herein. *Drury the Tailor v. Jenner*, 12 Wn. (2d) 508.

If the proviso of section 6 to which the Supreme Court below objected discriminates against interstate commerce, it would follow that a modification or removal of the proviso should remove the discrimination. But, in fact, such an action would destroy the equity of the single tax on gross income which now exists and would serve to produce inequities. Furthermore, it would in no way improve the situation of those engaged in interstate commerce, but would serve to discriminate against certain small groups engaged in local commerce. The opinion of the Court below would appear to require one of two

things: (1) the payment of a double tax, under *both* the manufacturing and wholesaling classifications, by those who both manufacture and sell articles in Washington, or (2) the payment of the tax under the wholesaling classification rather than the manufacturing category, with the possible abolition of the manufacturing classification. The double imposition of the tax upon Washington manufacturers selling their products in Washington would be patently unfair and discriminatory as to those so engaged in business. This would result in a tax payment of twice the amount paid by other Washington manufacturers (who sell their products for out-of-state delivery or put the goods to their own use), and by those engaged in purely wholesaling activities in Washington (whether selling goods delivered locally or goods delivered in interstate commerce). The second alternative is only a matter of words; it would require a vain and useless act. The tax consequences would be the same. If the manufacturing classification was totally removed, the only effect would be to cause Washington to lose a tax on local manufacturers to the extent their products were sold outside the State.

It has been demonstrated that the tax here complained of treats purely local activities the same way as it treats activities having interstate attributes. Under such circumstances this Court has held that those engaged in interstate commerce are not thereby discriminated against when subjected to a tax measured by the proceeds of interstate transactions consummated in the State. *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340. Respondent engages in various local activities, is admittedly engaged in business in Washington (R. 3, 4,

29-31). The *particular* local activity engaged in by respondent with which we are here concerned is that of making sales at wholesale which are consummated in Washington by delivery and transfer of possession in the State. As to these sales, respondent is taxed in *identically* the same manner as all others making purely wholesale sales which have no interstate attributes. Furthermore, it is taxed at the same rate and on the same measure as those making local sales of products of their own Washington manufacture. The *only* difference is that the latter calculates his tax by following the procedure set out for his given classification. The only *other* difference is that the latter is by that means also subjected to a tax on goods manufactured by him and disposed of by other means. It is the Washington manufacturer who has the greater burden!

The situation pertaining in another state is immaterial. The fact that the wholesaler (or the article) has been subjected to a tax in another state based upon its local manufacturing activities therein is a situation of sole concern to the other taxing jurisdiction. The local activity taxed in Washington is that of engaging in business as a wholesaler. The taxable event occurring in the State is the consummation of the sale by the delivery of the property to the buyer. This Court has upheld such taxation where purely local activities are taxed in the same manner, for under *Adams Mfg. Co. v. Storen;* 304 U. S. 307, and *Freeman v. Hewit,* 329 U. S. 249, there can be no such tax by another State. *Allied Mills v. Dept. of Treasury,* 318 U. S. 740; *International Harvester Co. v. Dept. of Treasury, supra.* It has been acknowledged that goods moving in interstate commerce will be subjected

to taxation in the various states in which business activities are conducted. *Dept. of Treasury v. Wood Preserving Corp.*, 313 U. S. 62; *International Harvester Co. v. Evatt*, 329 U. S. 416. It is acknowledged that local taxes will in some measure affect the commerce or increase the cost of doing it, but such must be condoned as a necessary incident to the obtaining of state revenue, unless the tax is such that interstate commerce is thereby unduly impeded. *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 48.

The Supreme Court below cited the "drummer cases," culminating in *Nippert v. Richmond*, 327 U. S. 416, as illustrative of the principle that interstate commerce may not be discriminated against (Appendix C, pp. 43, 44) and apparently the Court based its decision, at least in part, thereon. It has been established beyond question that the rules of discrimination laid out in that line of cases has been narrowly limited to flat-sum license taxes imposed on the business of soliciting orders. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; *Nippert v. Richmond, supra.*

Most manufacturers are not "wholesalers," as such. They fall under the wholesaling classification of the Revenue Act because of the broadness of its scope (it includes all sales not sales at retail), but few perform the commercial functions of the wholesaler. As a consequence, the price obtained for the sale of the goods does not include, generally, the added costs and profits of engaging in the wholesaling function. But when such function is performed, the sales price reflects the added receipts for such activities, and the measure (the gross proceeds of the sale) is thereby increased.

As a corollary of the right of Congress to regulate interstate commerce, this Court has held that the states may not impose taxes which will unduly burden interstate commerce. Conversely, so long as the result is not to unduly burden said commerce, taxes on those engaged in interstate commerce are perfectly proper. Slight burdens and irregularities must be accepted as the necessary evil of any general plan of taxation, and such slight irregularities have been accepted by this Court even when having an effect upon interstate commerce, so long as it was not the aim thereof to burden such commerce.

> "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." *Nippert v. Richmond, supra,* at p. 425.
>
> "It is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' [citing cases] and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." *Western Livestock v. Bureau of Revenue,* 303 U. S. 250, 254.
>
> "Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress." *McGoldrick v. Berwind-White Co., supra,* at pp. 46-47.

In consequence, it is immaterial that other states may have taxed persons for engaging in the manufacturing activities culminating in the production of the goods ultimately sold in Washington by respondent. Inasmuch

as Washington accords the same treatment to purely local transactions, and the tax here imposed does not otherwise place interstate commerce at a disadvantage in competition with intrastate commerce, the present tax does not discriminate against interstate commerce.

II.

The decision below is in conflict with Allied Mills v. Dept. of Treasury and International Harvester v. Dept. of Treasury, as well as being in conflict with principles established in cases involving state sales and use taxes, in all of which taxes were imposed by the state of the buyer or user upon the proceeds of sales of goods which had previously moved in interstate commerce. The decision of this Court in Freeman v. Hewit is not in conflict.

A. The Holding Below Conflicts With Numerous Decisions of This Court.

The Court below expressly declined to consider the authority of cases decided by this Court dealing with the imposition of gross receipts taxes (Appendix B, p. 41), basing its decision entirely upon the ground that a particular provision of the statute marked a discrimination against interstate commerce. Subdivision I of the argument has dealt with and, briefly, refuted any contention of discrimination. Turning to the main question, may the State of Washington include in the measure of its tax upon those engaged in business in the State receipts from wholesale sales in which the article, immediately prior to the consummation of the sale, was transported in interstate commerce directly to the purchaser in the State of Washington?

Two decisions of this Court are directly in point upon facts substantially identical with those involved herein,

so that the decision below necessarily is in direct conflict therewith. This fact was pointed out in the dissenting opinion of the *Columbia Steel* case (Appendix B, pp. 45, 46), and was again pointed out in a separate concurring opinion on the second appeal (R. 39; Appendix C, p. 54). In *Allied Mills v. Dept. of Treasury*, 318 U. S. 740, affirming, *per curiam*, 220 Ind. 340, and in *International Harvester Co. v. Dept. of Treasury*, 322 U. S. 340, this Court upheld the Indiana gross income tax imposed under facts substantially identical with those involved in this case. Because of the holding in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and in *Freeman v. Hewit*, 329 U. S. 249, there could be no question of multiple taxation for the tax has been "apportioned" to the buyer state by the last-cited opinions. This practical and workable formula has long been recognized and accepted by the states, permitting their obtaining the proper share of revenue from interstate business within their existing tax structure.

In addition to the *Allied Mills* and *International Harvester* cases, this Court has upheld the application of State sales and use taxes under facts in all essential respects similar to those involved in the Indiana cases:

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33;
McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70;
Jagels v. Taylor, 309 U. S. 619, affirming, *per curiam*, 280 N. Y. 766;
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62;
Graybar Electric Co. v. Curry, 308 U. S. 513, affirming, *per curiam*, 238 Ala. 116;
Nelson v. Sears, Roebuck & Co., 312 U. S. 359;
General Trading Co. v. State Tax Commission, 322 U. S. 335.

In *International Harvester Co. v. Dept. of Treasury*, *supra*, at pages 347-348, in passing upon the legality of a

gross receipts tax under facts (Class E sales) nearly identical with those in the present action, this Court bound together the rulings and theories involved in all of the above cited cases, though taxes of different name were involved, in the following language:

> "We do not see how these cases can stand if the Class E sales are to be exempt on constitutional grounds from the present tax. Indeed the transactions in Class E have fewer interstate attributes than those in the *Felt & Tarrant Co.* cases since the agreements to sell were made in Indiana. It is of course true that in the *Felt & Tarrant Co.* cases taxes of different names were involved. But we are dealing in this field with matters of substance not with dialectics. *Nelson v. Sears, Roebuck & Co., supra.* In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. In form the use tax is different since it is levied on intrastate use after the completion of an interstate sale. But we recognized in the *Berwind-White* case that in that setting the New York sales tax and the California use tax had 'no different effect upon interstate commerce.' 309 U. S. p. 49. And see *Nelson v. Sears, Roebuck & Co., supra.* The same is true of this Indiana tax as applied to the Class E sales. There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. See Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 929. Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a 'gross receipts' tax is utilized instead."

This same function was performed when this Court, in affirming *Dept. of Treasury v. Allied Mills,* 220 Ind. 340 (318 U. S. 740), cited without comment, as a basis for its *per curiam* opinion, *McGoldrick v. Felt & Tarrant Mfg.*

Co., supra, and *Felt & Tarrant Mfg. Co. v. Gallagher, supra,* which involved a sales tax and a use tax respectively.

In upholding impositions of gross receipts, sales, and use taxes upon those engaged in business within its borders as measured by the proceeds of sales of goods delivered to purchasers within the State, this Court has never placed any reliance on technical considerations such as where the contracts were negotiated, where title passed, where payment was received, etc., so long as the State had jurisdiction over the seller by reason of the fact that business activities were regularly conducted by him therein, provided that local activities were treated in the same manner and the circumstances were not such as to permit the danger of multiple taxation. Taxation by the buyer's state was expressly upheld despite the facts that (1) the orders were accepted at offices outside the State: *Allied Mills v. Dept. of Treasury, supra*; *Felt & Tarrant v. Gallagher, supra*; *McGoldrick v. Felt & Tarrant, supra*; *Jagels v. Taylor, supra*; *Nelson v. Sears, Roebuck & Co., supra*; *General Trading Co. v. State Tax Commission, supra*; (2) the orders had not even been solicited in the State: *Nelson v. Sears, Roebuck & Co.*; *Jagels v. Taylor, supra;* (3) payment for the goods was made to out-of-state offices: *Felt & Tarrant v. Gallagher, supra*; *Jagels v. Taylor, supra*; *McGoldrick v. Felt & Tarrant Mfg. Co., supra*; *General Trading Co. v. State Tax Commission, supra*; (4) the purchaser had even paid the freight on the interstate shipment: *McGoldrick v. Felt & Tarrant Mfg. Co., supra*; (5) the goods were not regularly carried in the seller's local stock: *Graybar Electric Co. v. Curry, supra*; (6) the goods were not procurable by the seller

within the State: *Graybar Electric Co. v. Curry, supra*; or (7) the contracts provided expressly for interstate shipment: *Graybar Electric Co. v. Curry, supra*; *International Harvester Co. v. Dept. of Treasury, supra.* All of the above cases, of course, involve direct interstate shipments, thereby establishing the immateriality of that fact.

B. Freeman v. Hewit Is Not in Conflict.

The opinion rendered by this Court in 1946 in *Freeman v. Hewit,* 329 U. S. 249, has been thought by many to reflect a change of thought on the Court. Some, including possibly the court below (Appendix B, p. 44), have thought it was intended to extend beyond the issue then before the Court, and thus to require a revaluation of decisions of the preceding eight years. For this reason alone this Court should review this case, for it presents the opposite set of facts, and will permit a decision to remove all doubts.

The broad view taken of the *Freeman* opinion is without basis. The facts involved were acknowledged to be the same as presented in *Adams Mfg. Co. v. Storen. Id.* at p. 255. The reason that the decision was not based solely on the *Adams* case appears to be two-fold: (1) a desire to restate the rationale of the holding, and (2) to remove thoughts that the force of the decision in the *Adams* case had been "sapped" by the *Berwind-White* decision. *Id.* at p. 257. (This latter was emphasized by the fact that all cases decided by the Court after *Adams Mfg. Co. v. Storen* had upheld the state tax involved.)

The following will show that the holding does not weaken the rule established by the *Adams* case, on one hand, and by the *Berwind-White, Allied Mills, Inter-*

national Harvester v. Dept. of Treasury, and similar decisions, on the other, that the state of the seller may not tax the receipts of interstate sales while the state of the buyer may (thus "apportioning" the tax, and preventing the possibility of multiple burdens):

1) The opinion expressly likened the case unto *Adams Mfg. Co. v. Storen*. *Id.* at p. 255.

2) The opinion on five occasions restricted its language to situations involving taxes by the state of the seller. *Id.* at pp. 255, 256, 257.

3) The Court admonished that

> "especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." *Id.* at p. 252.

Thereby it necessarily limited its holding to the case at bar.

4) The case blocked taxes by a state of the seller to save the field for a possible tax by the state of the buyer. *Id.* at pp. 256-258.

5) At no place does the opinion indicate disapproval of the Court's decisions permitting buyer states to tax.

6) *International Harvester Co. v. Department of Treasury*, upon which petitioner relies, was expressly distinguished from the case at bar as involving a tax on the transfer of property within the State. *Id.* at p. 258.

Freeman v. Hewit is entirely consistent with the prior decisions of the Court relative to gross receipts taxes measured by the proceeds of interstate sales. It holds no more than that the state of the seller may not impose such a tax. It expressly distinguished the type of situation involved in the instant case. In fact, the *Freeman* case is authority for petitioner's position for it saves the field of gross receipts taxation on sales to the state of the buyer.

CONCLUSION

In the instant case respondent is admittedly engaged in local business activities in Washington. A portion of his business consists of wholesale sales to Washington buyers in which the merchandise is shipped directly to the buyer from a point outside the State. Petitioner seeks to include the recipts from such sales within the measure of respondent's business and occupation tax.

The Commerce Clause does not prohibit state taxation of those engaged in interstate commerce, and such taxation may be measured by the gross receipts arising from activities which extend beyond State lines.

The tax does not discriminate against interstate commerce. It is imposed upon all who engage in business in Washington, being levied in the same manner upon those engaged in making purely local sales as upon those engaged in making sales having interstate attributes.

This Court has repeatedly held that the tax is not one which may be repeated by other states.

Moreover, persons engaged in interstate commerce should be required to pay their way by contributing their share toward the cost of local government, whose benefits and services they enjoy. Local businessmen not in interstate commerce should not be forced to bear extra tax burdens for benefits and services which they enjoy on a parity with their fellow businessmen engaged in interstate commerce.

The petition for certiorari should be granted.

DATED this 23rd day of December, 1949, at Olympia, Washington.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
Assistant Attorney General of the State of Washington,
Counsel for Petitioners.

Appendix A

REVENUE ACT OF 1935

[Chapter 180, Washington Laws of 1935[1]]

TITLE II. BUSINESS AND OCCUPATION TAX[2]

SEC. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products extracted for sale or commercial use, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(b) Upon every person engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

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[1]Remington's Revised Statutes of Washington, § 8370-1 *et seq.*

[2]As amended and in effect during the period covered by this action.

(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;

(d) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

(e) Upon every person except persons taxable under subsection (d) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

(f) Upon every person engaging within this state in the business of: (1) printing and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, primarily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of one-quarter of one per cent;

(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the

business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale" as defined herein. (§ 1, Ch. 156, Wash. Laws of 1943.)

SEC. 5. For the purposes of this title, unless otherwise required by the context:

(a) The term "tax year" or "taxable year" shall mean either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commission to use a fiscal year in lieu of the calendar year;

(b) The word "person" or word "company," herein used interchangeably, means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint-stock company, business trust, municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, co-operative, fraternal, non-profit or otherwise and the United States or any instrumentality thereof;

(c) The word "sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under subsection (d) of this section. It includes conditional sale contracts, leases with option to purchase, and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It shall also be construed

to include the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not;

(d) The term "sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated or imprinted) other than a sale to one who purchases for the purpose of resale as tangible personal property in the regular course of business or for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The said term also means every sale of tangible personal property to persons engaged in any business which is taxable under section 4 (f) (2) and section 4 (g) hereof.

The term "sale at retail" or "retail sale" shall be construed to include the sale of or charge made for tangible personal property consumed and for labor and services rendered in respect to the following: (1) the installing, repairing, cleaning, altering, imprinting or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clear-

ing of land and the moving of earth to the extent necessary for such constructing or improving, unless the charge therefor is stated separately from other charges made in connection with the work performed, under such rules as the tax commission may prescribe.

The said term shall not include the sale of or charge made for labor and services rendered in respect to the *mere* cleaning, fumigating, razing, or moving of existing buildings or structures, or the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey or other substances obtained from animals, birds or insects.

(e) The term "sale at wholesale" or "wholesale sale" means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail;

(f) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transac-

tion of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(h) The term "value proceeding or accruing" means the consideration, whether money, credits, rights or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer. The tax commission may provide by regulation that the value proceeding or accruing from sales on the installment plan under conditional contracts of sale may be reported as of the dates when the payments become due;

(i) The word "extractor" means every person who, from his own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or commercial use mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral or other natural resource product, or fells, cuts or takes timber or other natural products, or takes, cultivates, or raises fish, shell fish, or other sea or inland water foods or products; it does not include persons performing under contract the necessary labor or mechanical services for others;

(j) The word "manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or commercial use from his own materials or ingredients any articles, substances or commodities. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, all or a portion of the materials that become a part or whole of the manufactured article, the tax commission shall prescribe equitable rules for determining tax liability;

(k) The term "to manufacture" embraces all activities of a commercial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce is produced and shall include the production or fabrication of special made or custom made articles;

* * * (§ 1, Ch. 249, Wash. Laws of 1945.)

SEC. 6. Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons. (§ 3, Ch. 156, Wash. Laws of 1943.)

SEC. 7. The value of products extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, except:

(a) Where such products are extracted or manufactured for commercial use;

(b) Where such products are shipped, transported or transferred out of the state, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale.

In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such values. (§ 4, Ch. 178, Wash. Laws of 1941.)

SEC. 8. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this title, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state. (§ 5, Ch. 178, Wash. Laws of 1941.)

* * * * * * * * * *

SEC. 12. In computing tax there may be deducted from the measure of tax the following items:

* * *

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

* * * (§ 3, Ch. 249, Wash. Laws of 1945.)

Appendix B

COLUMBIA STEEL COMPANY, *Appellant*,

v.

STATE OF WASHINGTON, *Respondent*.[1]

[No. 30475. *En Banc*. May 6, 1948.]

SIMPSON, J.—This action was instituted by plaintiff when it filed its complaint, for the recovery of taxes paid, and as a notice of appeal from a deficiency assessment levied by the state tax commission.

The pertinent allegations of the complaint are: Plaintiff is a Delaware corporation and is qualified to transact business in the states of Washington, California, Utah, and Oregon. Its principal place of business is in San Francisco, California, but it maintains a sales office in this state, whose personnel consists of salesmen residing in the state of Washington. Plaintiff manufactures iron and steel products, and the by-products thereof, in California, Utah, and Oregon. It is engaged in foreign, interstate, and intrastate commerce.

October 3, 1947, the tax commission of the state of Washington levied a deficiency, or additional, assessment against plaintiff in the sum of $101,105.23, together with interest and penalties thereon, which made a total of $118,281.38. The deficiency assessment covered the years 1943, 1944, and 1945. It was based upon the business and occupation tax imposed upon persons engaged within the state in the business of making sales at wholesale, by chapter 180, p. 706, Laws of 1935, as amended by chapter 156, Laws of 1943, p. 487 (Rem. Supp. 1943, § 8370-4

[1]Opinion of Supreme Court of Washington rendered in companion case (30 Wn. (2d) 658), upon the conclusions of which the decision in the instant case was based.

[P.P.C. § 965-1] *et seq.*), in an amount equal to the gross proceeds of such business, multiplied by the rate of one quarter of one per cent. Plaintiff paid the assessment October 22, 1947, and then brought this action to recover.

Plaintiff owns a warehouse in the city of Seattle, but uses it only in connection with its intrastate and local business. Twenty per cent of the interstate business consists of the handling of iron and steel products and by-products manufactured by plaintiff in the states of California and Utah, which, when sold, are delivered from those states into the state of Washington by common carriers, who transport the products from the state of origin into this state on straight bills of lading to various customers in the state. Dealing in products purchased from manufacturers in Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Alabama, and other states and then shipped by common carrier from the states of manufacture into this state, comprised eighty per cent of plaintiff's business upon which the deficiency assessment was based. Forty per cent of the business on which the assessment was based, was done upon contracts negotiated, made, and concluded outside the state of Washington, with the result that the only thing that transpired in the state of Washington was the delivery of the steel products to various customers by common carriers. The remainder of the business was done upon contracts negotiated, made, and concluded through the joint efforts of plaintiff's sales personnel residing in this state, and other employees and officers of plaintiff residing and having their offices in other states. The deficiency assessment is based upon a tax upon amounts derived from business which the state of Washington is prohibited

from taxing under clause 3, Art. I, § 8, of the constitution of the United States.

The state tax commission demurred on the ground that the complaint did not constitute a cause of action. The court sustained the demurrer and, upon refusal of the plaintiff to plead further, entered judgment dismissing the action. Plaintiff then appealed to this court.

Appellant's assignments of error are: (1) the sustaining of the demurrer; and (2) the determination that the tax assessed and collected was not in violation of Art. I, § 8, of the constitution of the United States.

The tax here involved is the Washington state business and occupation tax, Rem. Supp. 1943, § 8370-4 *et seq.*, which, so far as this case is concerned, imposes a tax upon those making sales at wholesale, at the rate of one quarter of one per cent of the gross sales proceeds. Appellant's contention is that the business and occupation tax law, as applied to its transactions in interstate commerce, violates the commerce clause of the constitution of the United States. Respondent takes the position that gross receipts taxes, measured by the gross proceeds from interstate sales, when imposed by the state of the buyer, are legal, and not within the prohibition of the Federal constitution.

There have been hundreds of cases decided which deal with the imposition of taxes of the nature here involved. However, our view of the applicable rules of law makes it unnecessary to review many of the cases on the subject of taxing interstate commerce in so far as this case is concerned. The one question presented here is: May this state collect from those engaged in interstate commerce, taxes based on our business and occupation tax, Rem. Supp. 1943, § 8370-4 *et seq.*

The portions of the statute calling for our interpretation are as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be. . . ."

Subd. (a) of this section levies a tax upon every person engaged within this state in business as an extractor.

Subd. (b) exacts a tax from "every person engaging within this state in business as a manufacturer."

Subd. (c) taxes every person in this state who is in the business of making sales at retail.

And subd. (e) imposes a tax upon those in this state who are wholesalers.

Rem. Supp. 1943, § 8370-5 (e), defines the term "sale at wholesale" or "wholesale sale" as "any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail."

Subd. (j) of the above section reads:

"The word 'manufacturer' means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or commercial use from his own materials or ingredients any articles, substances or commodities. . . ."

Rem. Supp. 1943, § 8370-6 [P.P.C. § 965-5] provides:

"Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4 [§ 8370-4], shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,*

That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons." (Italics ours.)

Regardless of the uncertainty on the question of what types of state taxation on interstate commerce are allowable, it may be definitely stated that any tax which places interstate commerce at a disadvantage in competition with local commerce, is prohibited by the Federal constitution.

In passing upon that question in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325, the supreme court of the United States made the following holding:

"But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is *precluded if it discriminates against interstate commerce.*" (Italics ours.)

The court further said:

"For more than a century, since *Brown v. Maryland,* 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. [Citing cases.] For half a century, following the decision in *Philadelphia & Southern S. S. Co. v. Pennsylvania,* 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed."

Illustrative of this principle are the "drummer cases" culminating in *Nippert v. Richmond,* 327 U. S. 416, 90 L. Ed. 760, 66 S. Ct. 586, 162 A. L. R. 844. In holding unconstitutional a license tax upon persons soliciting sales, the court in the above case stated:

"The Richmond tax imposes substantial excluding and discriminatory effects of its own. As had been said,

the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun."

The argument is advanced that there is no showing that appellant in this case, or the people from whom it bought its products, paid a manufacturer's tax. This argument is effectually answered by the following quotation from *Freeman v. Hewit,* 329 U. S. 249, 91 L. Ed. 265, 67 S. Ct. 274:

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of

goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

It is further argued that, if the state in which the product is manufactured does not impose a manufacturer's tax, then the people engaged in interstate commerce in the state of Washington selling their products here, have an advantage in that they can sell at a price lower than that which must be fixed by local extractors or manufacturers. As indicated in the above opinion, the situation obtaining in another state is immaterial. We must interpret the statute as passed by the legislature. In our opinion, the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal constitution, and is invalid.

The judgment will be reversed, with instructions to the trial court to overrule the demurrer.

MILLARD, STEINERT, JEFFERS, BEALS, and SCHWELLENBACH, JJ., concur.

HILL, J. (dissenting)—I dissent. The decisions in the field of taxation with which we are here concerned represent "confusion worse confounded"; the only thing that is clear to me is that the supreme court of the United States recently decided the precise question presented here and held that such a tax, imposed by the state of

Indiana, did not violate the commerce clause of the Federal constitution. *Allied Mills v. Department of Treasury,* 318 U. S. 740, 87 L. Ed. 120, 63 S. Ct. 666, affirming *per curiam* 220 Ind. 340, 42 N. E. (2d) 34; *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, 88 L. Ed. 1313, 64 S. Ct. 1019, 1030.

These cases seem to me to be directly in point. They are not satisfactorily distinguished by the appellant and are ignored by the majority.

The judgment of dismissal of appellant's amended complaint should be affirmed.

MALLERY, C. J., concurs with HILL, J.

Appendix C

COLUMBIA STEEL COMPANY, *Respondent*,

v.

STATE OF WASHINGTON, *Appellant*.[1]

[No. 30950. *En Banc*. Sept. 3, 1949.]

BEALS, J.—Plaintiff in this action, Columbia Steel Company, is a corporation organized and existing under the laws of the state of Delaware, maintaining its principal place of business in the city and county of San Francisco, State of California, and a sales office in the state of Washington, where it has engaged in both intrastate and interstate business. Plaintiff has qualified, under the laws of the state of Washington, to carry on that portion of its business which consists of the sale of iron and steel products in this state.

In its amended complaint filed before the superior court for Thurston county, plaintiff alleged that, October 3, 1947, the tax commission of the state of Washington levied a deficiency or additional assessment against the plaintiff taxpayer, in the sum of $101,105.23, together with interest and penalties in the sum of $17,176.15, attaching a copy of the deficiency assessment to its complaint. The assessment covered the years 1943, 1944, and 1945, and was based upon Laws of 1935, chapter 180, p. 706, Rem. Rev. Stat. (Sup.), § 8370-1 [P.P.C. § 961-1] *et seq.*, as amended, which imposes a business and occupation tax upon persons or corporations engaged, within the state

[1]Opinion of Supreme Court of Washington rendered in companion case on second appeal, upon the conclusions of which the decision in the instant case was based. The above opinion is not reported in the official reports, but may be found at 134 Wash. Dec. 641. Portions of the opinion not involved in the instant action have been omitted.

of Washington, in the business of making sales at wholesale.

The amended complaint alleged that the plaintiff paid the tax demanded, together with penalties and interest, October 22, 1947. Paragraph No. 5 of the amended complaint reads as follows:

"The aforesaid deficiency assessment is based upon a tax upon amounts derived from business which the State of Washington is prohibited from taxing under Article I, Section 8, Clause 3 of the Constitution of the United States of America."

By the prayer of its amended complaint, plaintiff appealed to the superior court, and demanded that the deficiency assessment which had been levied against it be vacated; that the tax, penalties, and interest represented by the assessment be abated; and that the plaintiff taxpayer recover judgment against the state of Washington for the amount of the tax and penalties thereon paid by the plaintiff, together with interest from October 22, 1947.

The defendant filed a general demurrer to the amended complaint, which the trial court sustained. Plaintiff having refused to plead further, the trial court entered an order dismissing the appeal to the superior court, and also dismissing plaintiff's amended complaint with prejudice.

From this order of dismissal, plaintiff appealed to this court and, the cause having been heard, this court filed its *En Banc* opinion, May 6, 1948, reversing the order of the superior court from which the plaintiff had appealed, and remanding the proceeding to the trial court with instructions to overrule the demurrer interposed by the state of Washington to the complaint. *Columbia Steel Co. v. State*, 30 Wn. (2d) 658, 192 P. (2d) 976.

Upon remand to the superior court, defendant state of Washington filed its answer, denying the material allegations of the amended complaint and alleging that the tax which had been paid by the plaintiff, together with penalties and interest, was due to the state of Washington, and that there was no statutory or other authority for the payment by the state of interest on refunds of business and occupation taxes or similar impositions. The state asked that the action be dismissed at plaintiff's cost.

The parties stipulated that the action might be tried before the Honorable D. F. Wright, a member of the bar of the state of Washington and formerly a judge of the superior court for Thurston county, and an order of the superior court was entered appointing Judge Wright as such judge *pro tempore* to hear and determine the issues presented upon the trial of the action.

After the hearing, the trial court entered findings of fact and conclusions of law in favor of the plaintiff, to the effect that the plaintiff was entitled to judgment against the defendant state of Washington for $118,281.38, also concluding that the plaintiff was not entitled to a judgment for interest on that amount from the date the plaintiff paid the same to the defendant to and including the date of the judgment in the action. The plaintiff proposed a conclusion of law to the effect that it was entitled to recover such interest, which conclusion the court refused.

February 1, 1949, the superior court entered judgment in accordance with its findings of fact and conclusions of law, from which judgment the defendant state of Washington has appealed to this court.

Respondent has cross-appealed from that portion of the judgment refusing to allow respondent interest upon

the amount for which judgment in its favor was entered against the appellant.

Appellant assigns error upon the entry of the court's conclusions of law holding that appellant was prohibited from levying the tax which was the subject matter of the action, and that the respondent was entitled to judgment for the amount referred to above. Appellant also assigns error upon the entry of the judgment in respondent's favor, and upon the refusal of the trial court to dismiss respondent's amended complaint.

Cross-appellant (respondent) assigns error upon the court's ruling that it was not entitled to recover interest on the amount paid to the state from the date of such payment, and upon the refusal of the trial court to enter conclusions of law and judgment accordingly.

Upon the trial of the action after remand, the only witness who testified was Mr. T. M. Jenner, a tax commissioner of the state of Washington, who was called by the appellant. Mr. Jenner testified as to the procedure followed by the tax commission and the adoption of certain rules by that body.

The record before us and appellant's assignments of error show beyond question that, in entering the judgment appealed from, the trial court was following the opinion of this court in the previous appeal and the law as laid down therein.

We are, therefore, confronted with the question of whether the law as stated in our opinion in the first appeal has become "the law of the case," in so far as a determination of this appeal is concerned. If it be held that the decision of this court does establish the law of this case,

we may not, at this time, consider any questions involving the merits as argued by appellant.

Appellant recognizes the doctrine of "the law of the case," but argues that certain matters material to the facts of the case were not clearly set forth in the record before this court upon the previous appeal; that, since the previous appeal was decided, these items have in some respects been clarified; and that, for this reason, we should again consider the question presented upon its merits.

Appellant's arguments pertain to the question of whether, in so far as the facts of this case are concerned, respondent is a manufacturer or a wholesaler. Appellant contends that it is apparent from our opinion that this court considered respondent to be a manufacturer and not a wholesaler, and that, because of this misunderstanding, the court was led to an erroneous conclusion.

All of the facts relied upon by appellant in this connection were clearly set forth in the pleadings which were before us on the previous appeal, and that these facts were understood by the court, and considered, clearly appears from the following quotation from the opinion (30 Wn. (2d) 658, 659):

"Twenty per cent of the interstate business consists of the handling of iron and steel products and by-products manufactured by plaintiff in the states of California and Utah, which, when sold, are delivered from those states into the state of Washington by common carriers, who transport the products from the state of origin into this state on straight bills of lading to various customers in the state. Dealing in products purchased from manufacturers in Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Alabama, and other states and then shipped by common carrier from the states of manufacture into this state, comprised eighty per cent of plaintiff's business upon which the deficiency assessment was based."

The opinion of this court rendered on the previous appeal is specific and definite. Each question presented was considered and decided. The testimony of Mr. Jenner, on the second trial of the action, contained nothing which calls for any different result than that reached by the trial court in rendering the judgment now before us.

We have several times considered the doctrine of "the law of the case." In *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P. (2d) 1090, we said:

"The law is well settled in this state that, on a second appeal, we will not review questions decided by us on the former appeal. *Collins v. Terminal Transfer Co.*, 98 Wash. 597, 168 Pac. 174; *Pacific Power & Light Co. v. White*, 104 Wash. 528, 177 Pac. 313; *Ecuyer v. New York Life Insurance Co.*, 107 Wash. 411, 181 Pac. 871, 186 Pac. 327.

"Upon the retrial, the parties and the trial court were all bound by the law as made by the decision on the first appeal. On appeal therefrom, the parties and this court are bound by that decision unless and until authoritatively overruled."

In *Miller v. Sisters of St. Francis*, 5 Wn. (2d) 204, 105 P. (2d) 32, appears the following:

"The case having been here upon a former appeal, as to every question that was determined upon that appeal and as to every question that might have been determined, the opinion became what is called the law of the case upon the second trial, and cannot again be considered by this court upon a second appeal."

In *State ex rel. Seattle v. Department of Public Utilities*, 133 Wash. Dec. 861, 307 P. (2d) 712, we said:

"When this court denied the petition for recall of remittitur and correction of the judgment, it in effect approved the judgment entered by the superior court.

"Regardless of any other consideration, it is our opinion that the judgment of the superior court, entered upon the remittitur in obedience to the order of this court, became the law of this case."

The court then cited several of our decisions which referred to the doctrine in question.

By its assignments of error, appellant presents no question which was not determined on the previous appeal in this action, and no new question was raised by the pleadings or the evidence.

In entering its findings of fact, conclusions of law, and judgment, the trial court evidently recognized that the case was then controlled by our previous decision, and, the case having been remanded by this court to the trial court for further proceedings, that court meticulously followed our opinion.

In so far as questions here presented by appellant state of Washington are concerned, the doctrine of "the law of the case" applies, and appellant's assignments of error are not well taken. In accordance with this principle of law, we refuse to again consider the questions argued by appellant.

We shall now consider the question raised by respondent's cross-appeal, namely: Did the trial court err in holding that respondent was not entitled to recover interest from the date of payment on the amount which it had paid to the state?

* * * * * * * * * *

The judgment appealed from is affirmed upon appellant's appeal and is also affirmed upon respondent's cross-appeal. No costs will be allowed in this court to either party.

SIMPSON, C. J., JEFFERS, ROBINSON, SCHWELLENBACH, and GRADY, JJ., concur.

HILL, J. (concurring)—I concur without reservation in the holding that the Columbia Steel Company was not

entitled to interest on the amounts which the majori
holds were illegally exacted from it.

I concur also in the holding that no issue is present
here that was not previously presented to this court a
decided in *Columbia Steel Co. v. State*, 30 Wn. (2d) 6
192 P. (2d) 976. I am still of the opinion that that ca
was erroneously decided, for the reasons stated in my di
sent. See 30 Wn. (2d), at p. 664; 192 P. (2d), at p. 97
The holding therein, right or wrong, is the law of the ca
and the trial court correctly interpreted and followed
and should be affirmed, unless we are willing to overrul
our holding in the cited case, and that the majority is un
willing to do.

MALLERY and STEINERT, JJ., dissent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON,
E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES,
Petitioners,

v.

WEYERHAEUSER SALES COMPANY.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SMITH TROY,
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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This action presents the question of whether the Washington Business and Occupation tax as imposed upon respondent is repugnant to the Commerce Clause of the United States Constitution. The issue is, ad-

mittedly, the same as that in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, and *International Harvester Co. v. Department of Treasury*, 322 U. S. 340. Involved is the imposition of a gross receipts tax upon those engaged in business in Washington as measured by the receipts from sales wherein the merchandise was delivered in interstate commerce to buyers at points in that State. It is the reverse of the situation involved in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249.

Upon the first appeal of this action to the Supreme Court of Washington, that question was not considered. See dissenting opinion in companion *Columbia Steel Co.* case, Appendix B to petition, pp. 45-46. Rather, the Supreme Court below ruled that the Business and Occupation Tax was so framed as to *discriminate* against interstate commerce.

Both of the above points have been discussed in petitioners' Brief in Support of Petition for Writ of Certiorari, the first point at pages 24 to 29, and the second point at pages 14 to 24. However, certain of respondent's statements in his answering brief regarding the discrimination point require a short statement in reply. The attempt will be made only to explain and to analyze the Business and Occupation Tax statute itself, it being petitioners' belief that an understanding thereof will make it clear that there is in fact no discrimination in its imposition upon respondent. In so doing, an attempt will be made merely to supplement materials already covered in petitioners' supporting brief.

I.

FURTHER ANALYSIS OF THE BUSINESS AND OCCUPATION TAX

The Business and Occupation Tax is measured by the gross receipts or gross income of persons engaged in business in the State of Washington, and is so framed that the same receipt can be included in the measure of the tax only once.

An examination of the Revenue Act of 1935 (Chapter 180, Washington Laws of 1935), as amended at each biennial session of the Legislature since 1935, will demonstrate that the taxes imposed upon the gross receipts of those engaged in business are mutually exclusive, so that no business is subjected to more than one tax upon its gross receipts. The Business and Occupation Tax, with which we are here involved, is a gross receipts tax applicable to substantially all persons engaged in business in the State except those subjected to a special tax dealing with a specific business activity, such as, for example, a public utility. Provisions of the Business and Occupation Tax have been set forth in Appendix A of the petition.

Examination of the first sentence of § 4 will demonstate that the tax is imposed upon persons engaged in business for the privilege of engaging in business in Washington. The remainder of that section classifies all business activities into categories, such categories being for the purpose of setting out the rate and measure of the tax to be imposed upon those engaged in various types of business. It is the obvious intent to accomplish thereby two things: (1) impose varying rates upon different types of business according to the ability to pay, and (2) permit the use of three different technical terms as mea-

sures for the determination of the tax upon the different business activities; these measures, in turn, are adapted to the peculiar aspects of the business function performed.

The Business and Occupation Tax is one single tax composed of various categories into which all business activities are classified, but as to which no business activity will fall into more than one. If the definitions of the business activities found in § 5 do not themselves exclude a certain business from two categories, § 6 serves to resolve the situation by placing the activity into one or another classification for the purpose of imposing this one single tax upon the gross receipts of the business. This is not a statute imposing a wholesaler's tax, a manufacturer's tax, a retailer's tax, a tax on service businesses; it is one tax imposed upon the gross receipts or income of all engaged in business, the rate and measure of which tax is to be determined by fitting the business activity into a single classification.

Section 6 of the Revenue Act provides as follows:

> "Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons. (§3, Ch. 156, Wash. Laws of 1943.)"

Construing § 4, the imposing section, together with § 6, particularly having in mind the appropriate definitions contained in § 5, immediately establishes the fact that persons who are engaged in different businesses may find themselves falling under more than one classification.

Thus, a person may be operating a grocery store part of his time and be classified for the Business and Occupation Tax under the retailing category (§ 4(c)), and be a barber in his spare time and be classified under the service category (§ 4(g)). This is proper. Part of his tax will be determined under one rate and measure and part under another. However, the proviso states that one who is taxable under the *manufacturing* classification shall not again pay the same tax under the *wholesaling* classification *with respect to the sale of the article manufactured by him.* That is, one who manufactures an article and sells it in Washington would automatically be twice subjected to the same tax on the same business activity were it not for § 6. This is due to the broad definition of a wholesale sale to include all sales not at retail. See § 5(e), Revenue Act. To prevent this, one who has paid the tax measured by the gross proceeds of the sale of the article once (under the manufacturing classification) shall not pay the same tax on the same measure again (under the wholesaling classification).

It is as easy as that! And yet, through lack of analysis the Supreme Court of Washington held that the tax was imposed upon some wholesalers and not upon others!

It may be asked, Why have a manufacturing classification? There are three answers as to why a tax on sales alone would be inadequate and inequitable: (1) A manufacturer may not sell his goods but use them himself, and thus escape the business tax if it were imposed strictly on the basis of sales receipts; (2) A manufacturer might sell his article to a related company at a price lower than its true value, and thus again the sales receipts would not truly reflect the Washington business

activity; (3) If the goods so manufactured were sold for delivery outside the State of Washington, a tax measured by the local incident of *selling* is not permitted to the state of the seller under *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249, but a tax imposed upon the incident of manufacturing is permitted, although the goods are disposed of outside of the state, under *American Mfg. Co. v. St. Louis*, 250 U. S. 459. The Washington Legislature *might have* set up a manufacturing classification and so defined it that it included only those engaged in manufacturing who disposed of their goods by the three methods above-mentioned, and omitted those whose goods were sold at true value in Washington. Thus, the same result would have been reached; i. e., the single tax on manufacturers selling in Washington measured by the gross sales, but under the wholesaling classification. But instead, the manufacturing classification is broad and the wholesaling classification is broad, and the restriction as to those who both manufacture and sell the article in Washington is accomplished by § 6.

The State of Washington believes that those engaged in interstate commerce are as much obligated to pay their fair share of the obligations of government as are those engaged in purely intrastate activities. The State of Washington likewise acknowledges the fact that the imposition of taxes upon those so engaged in business having interstate attributes must be within the permissible confines of the Commerce Clause as interpreted by this Court. Petitioners, as will be seen by their position in the instant case, follow strictly the pattern set out by this court in *Allied Mills v. Department of Treasury*, 318 U. S. 740, and *International Harvester Co. v. Department*

of Treasury, 322 U. S. 340, on the one hand, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249, on the other hand. Likewise the State follows the ruling of this Court in *American Mfg. Co. v. St. Louis*, 250 U. S. 459, permitting a tax on a local manufacturer measured by the gross proceeds of sales, though such sales be for delivery in interstate commerce to out-of-state buyers.

II.

THERE IS NO DISCRIMINATION

The tax is paid by all engaged in business in Washington, whether or not such business has interstate attributes, at the same rate and measure, but is apportioned as to receipts from interstate sales to reflect fairly the local business done.

Respondent is a wholesaler (R. 29, 30), strictly a sales company. Respondent is not a manufacturer (R. 30), has not manufactured any of the pine lumber with which we are here involved (R. 31), but purchased it in Oregon and Idaho, and sold it to purchasers in Washington. It was delivered from Oregon or Idaho in interstate commerce directly to the purchaser in Washington (R. 30).

Respondent is a Washington corporation (R. 27). Respondent's business activities in this state amount into the millions of dollars annually (R. 29, 30). It so happens that pine lumber was obtainable in Oregon and Idaho but not in Washington (R. 31). This does not prevent respondent from doing a thriving business in the State of Washington in this commodity (R. 30). Neither should it prevent the State of Washington from exacting a fair tax from respondent for the privilege of engaging in these local business activities. Its sales in this and other products are used as a measure of its business in the State. There should be no magic aura over the pine lumber sales which does not exist over the millions of dollars of fir lumber sales to buyers in Washington merely because one type of lumber is transported across a state boundary.

The tax is fairly apportioned to respondent's business activities in Washington. The gross receipts are used as the measure of this business. In addition to the pine lumber sales and the local sales of Washington lumber to

Washington buyers, there are large quantities of Washington lumber shipped out of the State to buyers in other states and foreign countries. Proceeds from this latter type of sale are not, and cannot be, included in the measure of respondent's business tax. *Adams Mfg. Co. v. Storen*, 304 U. S. 307; *Freeman v. Hewit*, 329 U. S. 249. Yet it is certainly a Washington business activity. By including in the measure of the tax the proceeds of the purely local sales and only so much of the interstate sales as are delivered to Washington buyers, and excluding the sales to buyers in other states, the tax is apportioned fairly to represent respondent's business activity in Washington. This procedure has been approved by this Court on numerous occasions as representing a fairly apportioned tax free of any possibility of a multiple burden on any one feature of the business, a tax procedure which does not place interstate business at a competitive disadvantage, and one which still permits the states to exact a fair tithe for the local privileges enjoyed. The local taxable event is the transfer of possession, the consummation of the sale, in Washington. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; *International Harvester Co. v. Department of Treasury*, 322 U. S. 340; *Freeman v. Hewit*, 329 U. S. 249.

Where is there a discrimination? A person selling goods situated in Washington, but who is *not* the manufacturer, pays a tax at the rate of ¼ of 1% as measured by the gross proceeds of sales. § 4(e), Revenue Act. A person selling in Washington goods manufactured by him pays a tax at the rate of ¼ of 1% as measured by the gross proceeds of sales. §§ 4(b), 7, Revenue Act. A person selling goods which are shipped in interstate commerce to the buyer in Washington (as with respondent's pine

lumber sales) pays at a rate of ¼ of 1% as measured by the gross proceeds of sales. § 4(e), Revenue Act. All pay at the *same rate* on the *same measure*!

The tax is not aimed at interstate commerce. Wholly local transactions are treated in the same way. Any wholesaler, whether he ships in local or interstate commerce, pays the tax in exactly the same manner. Nor is the result like that of the "drummer" cases where a surface appearance of fairness discriminated against interstate commerce in application. The sales of local non-manufacturing wholesalers far, far exceed such interstate sales, so any "discrimination" would discriminate against a huge class of local business also. The Court is referred to the discussion at pages 19 and 20 of the supporting brief wherein the inequities of any change in the present procedure are set forth.

If respondent is engaged in business in Idaho and in Oregon, respondent should be, and undoubtedly is subjected to tax by those states; and, without doubt, the taxes so imposed are entirely proper and do not burden interstate commerce. Those States are not levying on respondent a tax for the local business activity of consummating wholesale sales measured by the gross receipts of these pine lumber sales, for this Court has prohibited such a tax (*Adams Mfg. Co. v. Storen, supra*; *Freeman v. Hewitt, supra*), and has permitted it by the state of the buyer where the sale is consummated by the transfer of possession (*Allied Mills v. Department of Treasury, supra*; *International Harvester Co. v. Department of Treasury, supra*).

Not being a *maufacturer* of the pine lumber sold, respondent itself cannot be subjected to a tax (as in *American Mfg. Co. v. St. Louis*, 250 U. S. 459) by the

States of Oregon or Idaho measured by the gross receipts from the sales of pine lumber to Washington buyers for the local activity of manufacturing. Thus, respondent is not even a person who could qualify as one falling under both the wholesaling and manufacturing categories of the Business and Occupation Tax! There is no multiple burden, or possibility thereof. Respondent, as a person, is not in a position to be hurt by the fact that a Washington manufacturer selling his product in Washington does not pay the business tax twice.

Respondent contends that it is hurt because Idaho or Oregon might have imposed a tax upon some *other* businessman in the State measured by the proceeds of the manufacturing activity. Respondent, then, is contending that the cost of his product is subject to a possible increase.

> "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." *Freeman v. Hewit*, 329 U. S. 249.

There is no such interference here. Respondent ignores the fact that the tax is on *persons* engaged in business. There will be as many subject to this tax as there are persons engaged in business. The tax is on the gross receipts or income of such businesses. Obviously, an article may go through one or many hands in the selling process, and will thereby be subjected to as many taxes as there are handlers thereof. Just as obviously, several handlers of an article will cause the cost to rise. Gross receipts taxes have long been approved. This vice, if it be such, is inherent in such a tax.

III.

THE BUSINESS AND OCCUPATION TAX IS AN EXCISE TAX

The tax is an excise, not an ad valorem tax, the measure "value of the products manufactured" being a term of art.

Respondent has repeatedly referred to the Business and Occupation Tax as an ad valorem tax as imposed upon those engaged in manufacturing activities. No reason is given for this reference nor does any reason exist. Apparently respondent has taken the term "value of the products manufactured," as used in § 4(b) and defined in § 7, and has twisted it to imply some sort of property taxation. His reasons for doing this are not very clear.

The measure chosen for the manufacturing classification, "value of the products manufactured" is a technical term of art given express meaning by definition in § 7, and that meaning is, for the most part, the gross proceeds of sales. This is the same measure, "gross proceeds of sales," as used for the wholesaling classification. See § 4(e), Revenue Act. This is the measure which would be used as to all sales subject to comparison with respondent's activities herein.

The use of this technical term of art does not alter what is in fact an excise tax. In this field, this Court has said, we deal "with matters of substance not with dialectics." *International Harvester Co. v. Department of Treasury*, 322 U. S. 340.

CONCLUSION

The Business and Occupation Tax is levied on all persons engaged in business measured by the gross receipts thereof. The fact that a person will perform several commercial functions with regard to the same product does not serve to cause multiple imposition of the tax, it being one which is levied only once on each receipt.

All persons selling goods to buyers in Washington, whether delivery is made in intrastate or interstate commerce, and whether they be the manufacturer of the goods or not, pay a tax on the identical measure at the identical rate.

The tax is apportioned to fairly measure respondent's activities in Washington. It does not aim at, discriminate against, nor impose a direct burden on Interstate Commerce. Purely local business is treated in the same manner.

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON, E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES,
Petitioners,

vs.

WEYERHAEUSER SALES COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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BRIEF IN OPPOSITION TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The following matters are respectfully presented.

OPINIONS BELOW

The opinion of the Supreme Court of Washington on the firs appeal herein (R. 22) is reported in 30 Washington Reports, 2d Series, p. 947. The opinion of said court on the second appeal (R. 37) is not yet officially reported.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under § 1257 (3) of Title 28, United States Code, seeking review of a judgment of the highest court of the State of Washington, entered October 4, 1949 (R. 40), based on a decision of said Court entered September 3, 1949 (R. 37), wherein the validity of a particular adminstrative application of a taxing statute of the State of Washington is drawn in question on the ground of its being repugnant to the Constitution of the United States. The petition was filed on December 27, 1949.

STATEMENT OF CASE

The following is submitted for the purpose of clarification and to supply certain matters omitted in petitioner's brief.

Respondent is a wholesaler and not a manufacturer of lumber, selling in the State of Washington and elsewhere both in local and in interstate commerce (R. 29). For convenience of reference respondent's sales activities, in so far as here relevant, may be classified as follows:

Class A Activities. Local wholesale sales of lumber and other forest products to Washington customers (R. 29).

Class B Activities. Wholesale sales in interstate commerce, to Washington customers, of certain pine lumber, *not procurable in Washington* (R. 31), under contracts negotiated and made in Washington (R. 30).

Class C Activities. Wholesale sales in interstate commerce, to Washington customers, of certain pine lumber, *not procurable in Washington* (R. 31), under contracts negotiated and made elsewhere (R. 30).

In both *Class B* and *Class C Activites,* the sales contracts provided for the sale of specified sizes and grades of lumber, manufactured or to be manufactured by a specified manufacturing plant or plants in Oregon or Idaho, f. o. b. common carrier at such plants for transporation at the purchaser's expense, and title and risk of loss passed to the purchaser at the f. o. b. point (R. 30).

The facts with respect to the localization of various incidents of sale and the amounts involved in each category may be summarized as follows:

	Activities or other incidents in Washington		
	Class A Activities (R. 29)	Class B Activities (Pine lumber Sales) (R. 30, 31)	Class C Activities (Pine lumber sales) (R. 30, 31)
Solicitation of orders	Yes	Yes	No
Acceptance of orders	Yes	Yes	No
Maintenance of stock of goods	Yes	No	No
Availability of goods locally	Yes	No	No
Appropriation of goods to contract	Yes	No	No
Delivery of goods	Yes	No	No
Passage of title	Yes	No	No
Passage of risk of loss	Yes	No	No
Residence of purchaser	Yes	Yes	Yes
Collection of price	Yes	Yes	Yes
Gross sales May 1, 1945, to December 31, 1946, inclusive	$6,530,648.00	$1,919,874.96	$1,355,108.10

Respondent's pine lumber sales were made in competition with other wholesalers of lumber who manufacture in Washington the lumber which they sell at wholesale to Washington cusomers (R. 32).

Under the Washington Business and Occupation Tax (Ch. 180, Washington Laws of 1935, as amended; Remington's Revised Statutes (Supp.) § 8370-1 *et seq.*), a gross income tax is imposed upon wholesalers for the privilege of engaging in business (Id. § 8370-4), but the tax is inapplicable to manufacturing wholesalers who are subject to tax for the privilege of manufacturing (Id. § 8370-6).

The Tax Commission of the State of Washington has rule making powers (R. 27, 28). Prior to May 1, 1945, its rules (R. 28, 29) did not contemplate the taxation of respondent's *Class B* and *Class C Activities*. As of May 1, 1945, an amendment of Rule 193 was promulgated (R. 29; see R. 11-12) under which the gross income from such activities was asserted to be taxable.

Respondent sued to enjoin the collection of the tax as applied to its sales in interstate commerce (*Class B and Class C Activities*) (R. 1), and has prevailed in the Supreme Court of Washington on two occasions (R. 22, 37). In the first appeal (R. 22) it was determined in effect that the tax so applied discriminated against interstate commerce and was consequently invalid and in the second appeal (R. 37) that the principle of "the law of the case" applied.

Discrimination was found for the reason that whereas the state sought to exact a tax from the respondent for the privilege of selling at wholesale in interstate commerce, it exacted no tax from competing local wholesalers who were subject to an antecedent *ad valorem* tax for exercise of the local privilege of manufacture. (R. 22; see Petitioner's Brief, Appendix B, p. 39, at p. 45).

SUMMARY OF ARGUMENT

1. The court below has found that the tax, as here applied, discriminates against interstate commerce for the reason that respondent in its sales to Washington customers in interstate commerce is required to pay a gross income tax for the privilege of sale, whereas those who perform the same taxable act, but who manufacture in Washington, are not so

taxed. This conclusion is considered to be correct for the following reasons.

(a) The manufacturers' tax and the wholesalers' tax are levied for different and unrelated privileges and have a different measure, the former *ad valorem* and the latter unapportioned gross sales. The Supreme Court of Washington has held these privileges to be distinct for purposes of classification, and they are required to be distinct (under the doctrine of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459) in order to save the constitutionality of the manufacturers' tax. In terms of legal analysis, the determination of discrimination is therefore correct.

(b) The conclusion is also correct in terms of economic analysis. Depending on the analytical approach, manufacturing and selling may be taken to be discrete activities or as parts of a single integrated process. If they are treated as discrete, discrimination conclusively appears. If (in keeping with the premises of petitioner's legal analysis) manufacturing and selling are taken to be integrated, then any comparison of the competitive position of the Washington manufacturing-wholesaler and the respondent, as a non-manufacturing-wholesaler in interstate commerce, requires consideration of all the antecedent tax burdens, *ad valorem* and otherwise, actually or potentially inhering in respondent's cost of goods. It has been held that the potentiality of discrimination in this area will be decisive against the tax (*Freeman v. Hewit,* 329 U. S. 249) and that a court is not justified in making a determination on the basis of the temporary and shifting incidence of state taxation. The tax therefore offends the Commerce Clause.

2. The tax as here applied offends the Commerce Clause for reasons other than those assigned by the court below.

The vice in the tax is that it is an unapportioned tax on the gross receipts of interstate commerce, an exaction recognized to be invalid since *Fargo v. Hart,* 193 U. S. 490. Respondent has paid all taxes in respect of its local Washington sales. The conduct of a local business (for the privilege of engaging in which respondent has paid in full) will not justify a tax upon the unapportioned gross receipts of that part of respondent's business which is exclusively in interstate commerce.

3. The reasons assigned for the allowance of the writ appear inadequate in view of the apparent invalidity of the tax in its present application. The cases chiefly relied upon by the petitioner (*Allied Mills v. Department of Treasury,* 318 U. S. 700, and *International Harvester Co. v. Department of Treasury,* 322 U. S. 340) do not involve the element of discrimination (inherent in the tax statute and the administrative practice) which constituted the basis of decision below. On the broader question of invalidity (not involved in the decision below) such cases have some equivocal relevance, but in view of their facts, and later statements in *Freeman v. Hewitt, supra,* they are considered to be inapplicable. They are particularly inapplicable because in the instant cases the subject matter of the sales herein in question was goods *not procurable in Washington.* The instant case is therefore not one in which the taxpayer was in a position to choose between local deliveries from local stocks and out of state delivery at some f. o. b. point, and chose the former, for reasons of convenience, a circumstance emphasized in the *International Harvester* case.

ARGUMENT

1. Analysis of the Statute.

The Washington Business and Occupation Tax (Ch. 180, Washington Laws of 1935, as amended; Remington's Revised Statutes (Supp.) § 8370-1 *et seq.*) imposes a tax upon every person, including corporations, "for the act or privilege of engaging in business activities" (See Sec. 4; Remington, § 8370-4) measured as follows:

(a) upon extractors, ¼% of "the value of the products extracted for sale or commercial use;"

(b) upon manufacturers, ¼% of "the value of the products manufactured;"

(c) upon retailers, ¼% of "the gross proceeds of sales of the business";

(d) upon certain grain wholesalers, 1/100% of the "gross proceeds derived from such sales";

(e) upon all others "engaging within this state in the business of making sales at wholesale" ¼% of "the gross proceeds of sales of such business;"

(f) upon publishers and highway contractors, ¼% of "the gross income of the business;"

(g) upon all others, ½% of "the gross income of the business."

In the case of extractors and manufacturers the measure is *ad valorem,* although "value of the products" is taken to be the equivalent of sale price except where there is no sale or where proceeds of sale "are not indicative of true value" (See Sec. 7; Remington, § 8370-7). In the case of wholesalers and retailers the measure is gross sales and in all other cases

gross receipts. The rates vary, although manufacturers and wholesalers take the same rate (¼%) applicable in the former case to the *ad valorem* measure and in the latter case to "gross proceeds of sales."

Under Sec. 6 of the Act (Remington, § 8370-6) by reason of an amendment, (Washington Laws of 1943, Ch. 156, Sec. 3) any wholesaler (other than a grain wholesaler) who is taxable as an extractor or a manufacturer, and is thus subject to the *ad valorem* tax for extraction or manufacture, is not taxable as a wholesaler.

Sec. 12 of the Act (Remington, § 8370-12) requires deduction from the tax measure of

> "(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States."

Section 187 of the Act (Remington, § 8370-187) prescribes a registration procedure and provides that every person who engages in any business or performs any act for which a tax is imposed shall, whether taxable or not, "apply for and obtain from the commission [the state tax commission] upon the payment of a fee of one dollar, a registration certificate," and that "no person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section."

Section 207 of the Act (Remington, § 8370-207) provides that "it shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein; or to engage in business after his certificate of registration shall have been revoked by order of the tax commission." Violation is a gross misdemeanor.

Under Section 202 of the Act (Remington, § 8370-202) taxes are collectible by warrant, and if any warrant is not paid the tax commission may "revoke the certificate of registration of the taxpayer against whom the said warrant was issued"

The tax is in terms, in incidence, and in effect a tax "for the act or privilege of engaging in business activity" and has been held to be such in

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650.

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90.

and by necessary inference in

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434.

As applied to extraction and manufacture it is a tax upon a local privilege with an *ad valorem* measure valid under *American Manufacturing Co. v. St. Louis,* 250 U. S. 459. As to all other matters it is a tax on a privilege, which, depending on the circumstances, may or may not be local, and the measure is unapportioned gross receipts.

The evident purpose of the statute is to levy an excise on all manner of business activities. Since the same person could be taxed for the privilege of manufacturing and also for the privilege of selling (and was so taxable prior to the 1943 amendment) the effect of § 8370-6 is to exempt the local manufacturing wholesaler from tax for the privilege of wholesaling.

2. The Tax As Here Applied Discriminates Against Interstate Commerce.

The nature and consequences of the discrimination have been stated by the court below as follows:

> "* * * *, the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal Constitution and is invalid."

(This appears in the first opinion in the companion case of *Columbia Steel Co. v. State of Washington* (Petitioner's Brief, Appendix B, p. 39) adopted as the basis of decision in the first appeal herein (R. 22).

In its discussion of discrimination the State subsumes both the manufacturers' tax and the wholesalers' tax under the general head of taxes on gross income and erroneously treats them as identical (Petitioner's Brief, 16-19). At the same time it presses an economic argument based on the inconsistent premise that the two taxes are distinct (Petitioner's Brief, 19 *et seq.*)

These taxes are levied for different and unrelated privileges, the local privilege of manufacture, on the one hand, and the privilege of selling at wholesale on the other hand. They have been held to be distinct for purposes of classification:

> *Drury the Tailor v. Jenner*, 12 Wn. (2d) 508, 122 P. (2d) 493

and see also:

State ex rel Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91 .

Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 363

They are required to be distinct to save the constitutionality of the manufacturer's tax which is self-evidently drawn to utilize the rule of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, without colliding with the doctrine (settled since *Fargo v. Hart,* 193 U. S. 490) that the unapportioned gross receipts of interstate commerce are not a proper subject of state taxation. *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292; *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307; *Freeman v. Hewit,* 329 U. S. 249. In terms of legal analysis payment of the manufacturer's tax is as lacking in relevance to the privilege of wholesaling as the payment of any other tax with an *ad valorem* tax measure. The distinction has been emphasized in *Freeman v. Hewit,* supra, wherein it was said:

> "That tax [the manufacturers' excise of *American Mfg. Co. v. St. Louis*] then, unlike this [the seller's excise of *Freeman v. Hewit*], was not in fact a tax on gross receipts."

It is submitted therefore that the charge of discrimination is not answered by the claim that the two taxes are or may be equivalent in ultimate dollar amount. The respondent should not be taxed for the privilege of selling in interstate commerce in competition with local manufacturing wholesalers who are not taxed for the privilege of selling in local commerce.

The State argues, by way of confession and avoidance, that the competing wholesalers are subject to equivalent dollar burdens (in the State of Washington) and that parity is thereby achieved. It is said that the local manufacturing wholesaler is subject to an antecedent *ad valorem* tax attaching to the privilege of manufacture, and that the resulting economic burden is equivalent to that proposed for the respondent. Equivalence is said to result from the fact that the rate is the same (¼%) and that "value of the products manufactured" is usually [although not necessarily] the same as the "gross proceeds of sales" of the wholesaler.

This argument gives full effect to the antecedent tax burdens of the local manufacturing wholesaler and conveniently ignores all antecedent tax burdens which actually or potentially inhere in respondent's costs of goods sold. Specifically it ignores the potential economic burden of a manufacturer's tax in the state of origin under *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, or a gross income exaction on the terminal sale in the state of origin under *Department of Treasury v. Wood Preserving Corporation,* 313 U. S. 62, as well as conventional *ad valorem* and other exactions.

Analytically the steps in the process of production and distribution may be treated either as discrete or as integrated, but they may not be treated as both in the same analysis. If they are treated as discrete (that is, if manufacturing is analytically distinct from sale) discrimination conclusively appears. If they are treated as integrated, the position of competing wholesalers can be assessed only in terms of the total economic burdens, actual and potential,

which attach to each in the course of the integrated process. Having adopted integration for purposes of local analysis, the State cannot properly reject integration for purposes of interstate analysis. Hence no fair appraisal of respondent's competitive position is possible without taking account of every element of pyramided tax liability attaching to the goods, actually or potentially, at the time of sale. Without this petitioner's argument fails for infirmities of analytical method. If the analysis were correctly pursued, it would appear that respondent's goods enter the State of Washington in interstate commerce freighted with actual or potential antecedent tax burdens equal to or greater than those sustained by the local manufacturing wholesaler who is exempted from the tax on wholesalers.

Although a minute examination of every transaction at the moment of sale might eventuate in a correct conclusion as to comparative burdens, this Court has stated that such an examination will not be made.

It is said:

> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various states at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce;"

and further;

> "* * * that, for the time being only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated." *Freeman v. Hewit, supra.*

Under this view it is immaterial what taxes have at a particular moment been levied in the state of origin, since potential exercise of the power rather than actual exercise is the controlling consideration. It appears, therefore, that the petitioner's argument of economic equality, aside from its spurious analytical method, represents a bootless inquiry. The imminence and potentiality of discriminatory burden invalidate the tax.

3. The Tax As Here Applied Offends the Commerce Clause For Reasons Other Than Those Assigned By the Court Below.

In the area of sales, use and gross receipts taxes this Court has had occasion to uphold taxes levied in respect of activities prefatory to interstate commerce,* and also to uphold taxes levied in respect of activities at or subsequent to the termination of interstate commerce. ** However such taxes have

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* (e. g.) **American Manufacturing Co. v. St. Louis,** 250 U. S. 459 (manufacturer's excise); **Oliver Iron Mining Co. v. Lord,** 262 U. S. 172 (excise on extraction of natural resources); **Coverdale v. Arkansas-Louisiana Pipeline Co.,** 303 U. S. 604 (excise on production of power for interstate transportation); **Utah Power & Light Co. v. Pfost,** 286 U. S. 165 (excise on generation of electricity); **Western Livestock v. Bureau of Revenue,** 303 U. S. 250 (excise on publication of newspaper measured by gross receipts from advertising); **Department of Treasury v. Wood Preserving Corp.,** 313 U. S. 62 (gross receipts tax on sales of goods consumated by local delivery but destined for interstate transportation).

** (e. g.) **use taxes: Henneford v. Silas Mason Co.,** 300 U. S. 577; **Felt & Tarrant Manufacturing Co. v. Gallagher,** 306 U. S. 62; **Southern Pacific Co. v. Gallagher,** 306 U. S. 167; **Nelson v. Sears, Roebuck & Co.,** 312 U. S. 359; **General Trading Co. v. State Tax Commission,** 322 U. S. 335; **consumption taxes in respect of sales made to local buyers in interstate commerce, where deliveries of goods are made within the state, McGoldrick v. Berwind-White Coal Mining Co.,** 309 U. S. 33; **McGoldrick v. Felt & Tarrant Mfg. Co.,** 309 U. S. 70; **gross receipts taxes levied in respect of proceeds of sales under similar circumstances, Allied Mills Inc. v. Department of Treasury,** 318 U. S. 740; **International Harvester Co. v. Department of Treasury,** 322 U. S. 340.

been held invalid under the Commerce Clause where they directly burden interstate commerce, (e. g.)

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (Washington Business and Occupation Tax as applied to broadcasting and measured by gross receipts);

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (Same as applied to business of stevedoring and measured by gross receipts);

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307 (Indiana gross income tax on sales in interstate commerce);

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (Washington Business and Occupation Tax as applied to fruit brokerage and measured by gross receipts);

Freeman v. Hewit, 329 U. S. 249 (Indiana gross income tax on sales in interstate commerce);

McLeod v. J. E. Dilworth Co., 322 U. S. 327 (Sales tax in the state of the buyer in respect of sales in interstate commerce);

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (New York privilege tax measured by gross receipts).

The exaction in the instant case presents no issue not implicitly decided in the foregoing and prior cases.

It has been settled since *Fargo v. Hart,* 193 U. S. 490, that an unapportioned tax on the gross receipts of interstate commerce is invalid and this doctrine has been convincingly reaffirmed in *Crew Levick Co. v. Pennsylvania,* 245 U. S. 229 and *Freeman v. Hewit,* 329 U. S. 249, as well as elsewhere.

Aside from the obvious vice of actual discrimination, discussed *ante,* the vice in the proposed tax is that it is an unapportioned tax on gross receipts exacted for the privilege of conducting activities in interstate commerce. The fact that respondent exercises local privileges (it's *Class A Activities*) for which it pays in full, is not a justification for an unapportioned tax on activities exclusively in interstate commerce, (e.g.) respondent's *Class C Activities,* where petitioner would tax the entire gross receipts on the sole ground that the customer resides in Washington and pays the purchase price there.

4. The Reasons Assigned For Allowance of the Writ Appear Inadequate.

A. The court below has found that the petitioner's administrative policy discriminates against interstate commerce. The nature and reality of the discrimination appear to be clear. The consequences of discrimination are well settled by the decisions of this Court.

B. No general issue of the constitutionality of the Business and Occupation tax is presented. The issue relates only to a particular administrative interpretation, the vice in which may be cured if petitioner recedes to the position which it occupied prior to the promulgation of its rules of May 1, 1945.

C. The cases of *Allied Mills v. Department of Treasury,* 318 U. S. 740 and *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, involved no administrative discrimination analogous to that considered by the court below and are not in point. The instant case is fully dis-

posed of on the basis of statutory and administrative discrimination.

D. Concerning the broader grounds on which the tax may be invalidated (not necessary to the decision below), the relevance of the cases relied upon by petitioner is difficult to appraise because their facts are not wholly clear. It appears that both the *Allied Mills* and *International Harvester* cases involved deliveries of goods by the seller in the taxing state (taxable under the doctrine of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 70), or if not, that the seller was in a position to make deliveries out of local stocks and chose delivery at some out-of-state f.o.b. point for reasons of convenience to the seller. The opinion in the *International Harvester* case emphasizes the point that no showing was made that the goods "could be obtained only outside Indiana" (322 U. S. 340, 343, n. 3). In *Freeman v. Hewit*, 329 U. S. 249, it was stated that the tax sustained in the *International Harvester* case was "a tax on the transfer of property within the state [of Indiana]." In the case at bar the sales in question were wholly of pine lumber, none of which *"was obtainable or could have been procured by plaintiff* [respondent] *in said state"* (R. 31) [of Washington] (Italics supplied). It thus appears that the cases relied upon by petitioner are in the line of authority of *Berwind-White*, which is not applicable here in view of *McLeod v. J. E. Dillworth Co.*, 322 U. S. 327 and *Freeman v. Hewit*, 329 U. S. 249, or if they stand for more, that they are inapplicable because in the case at bar the goods sold to Washington customers were not locally procurable.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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